

Hon. James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

HUMBERTO REYES-RODRIGUEZ, et. al.,

Defendants.

NO. CR09-160JLR

MOTION FOR RULE 15
DEPOSITION OF
MATERIAL WITNESS

NOTE ON CALENDAR:
August 21, 2009

A. Introduction

The United States of America, by Jeffrey C. Sullivan, United States Attorney for the Western District of Washington, and Sarah Y. Vogel, Assistant United States Attorney, moves for authorization to take and use a deposition preserving for trial the testimony of material witness Marcos Neumann-Garcia, pursuant to Fed. R. Crim. P. 15.

The United States has requested the position of all parties on this motion in advance, and none have indicated they oppose this procedure.

B. Basis for Motion

Marcos Neumann-Garcia was arrested on November 24, 2008, and charged with committing fraud in connection with obtaining and using immigration visas. *See United States v. Neumann-Garcia*, CR08-403RSM. He was detained pending trial. *Id.*, Dkt. 6. Neumann-Garcia eventually entered guilty pleas to two counts of visa fraud, and was

1 sentenced by Judge Martinez on June 26, 2009, to a term of 12 months + 1 day of
2 incarceration, to be followed by three years of supervised release. *Id.*, Dkt. 27.

3 Neumann-Garcia presently is in custody at FDC-SeaTac, but may soon be
4 transferred to another facility. His expected release date is in October of 2009. He was
5 represented by Federal Public Defender Carol Koller throughout his case.

6 Neumann-Garcia is a citizen of Mexico without legal residency status in the
7 United States. As such, he is subject to deportation upon completion of his criminal
8 sentence. It is expected that when he completes his current term, he will be transferred
9 from Bureau of Prisons custody to Immigration and Customs Enforcement custody, and
10 that deportation and removal proceedings will commence by mid-October. He could be
11 deported within a few weeks thereafter.

12 Neumann-Garcia also is a material witness in the above-captioned case, and the
13 United States intends to present his testimony at trial. He was a licensed real estate
14 professional who conducted, and attempted to conduct, several real estate and loan
15 transactions in concert with indicted defendants Humberto Reyes-Rodriguez, Alexis
16 Ikilikyan, William Poff, and other charged and uncharged conspirators in the alleged wire
17 and bank fraud conspiracy charged in *United States v. Reyes-Rodriguez, et. al.*, CR09-
18 160JLR. Neumann-Garcia is referenced in the Indictment in CR09-160JLR under the
19 initials "M.N.," and was the named purchaser of at least one of the primary properties at
20 the center of the conspiracy. Dkt. 1, ¶ He also was a correspondent in several email
21 communications with the charged defendants that may be introduced as evidence at trial.

22 Counsel for Neumann-Garcia, Carol Koller, has requested that his testimony be
23 preserved by deposition, so that he can be transferred out of Bureau of Prisons custody as
24 soon as his criminal sentence is complete, and thus begin the deportation and removal
25 process. If his testimony is not preserved through deposition prior to his release from
26 BoP custody, the United States will seek his detention pursuant to 18 U.S.C. § 3144 as a
27 "material witness." Trial of this matter now is scheduled for January 11, 2010. Detention
28

1 of Neumann-Garcia until that date effectively would add at least four months to his
2 criminal sentence.

3 In the event that Mr. Neumann-Garcia's deportation proceedings do not result in
4 his removal from the United States by the date of trial, then he will still be called to testify
5 in person.

6 **C. Discussion**

7 Fed. R. Crim. P. 15 sets forth the procedures by which a deposition may be taken
8 in criminal cases, and it contemplates that a deposition is appropriate in exceptional
9 circumstances:

10 **In General.** A party may move that a prospective witness be
11 deposed in order to preserve testimony for trial. The court
12 may grant the motion because of exceptional circumstances
13 and in the interest of justice. If the court orders the deposition
14 to be taken, it may also require the deponent to produce at the
deposition any designated material that is not privileged,
including any book, paper, document, record, recording, or
data.

15 Fed. R. Crim. P. 15(a)(1). In addition, a person detained as a "material witness" may
16 himself request to be deposed and then released. Fed. R. Crim. P. 15(a)(2). The rule also
17 provides that "[t]he parties may by agreement take and use a deposition with the court's
18 consent." Fed. R. Crim. P. 15(h).

19 The procedures for the deposition are designed to allow the deposition testimony
20 to be used as substantive evidence during trial if the witness is unavailable for live
21 testimony. *See* Fed. R. Crim. P. 15(e).

22 The decision to grant or deny a motion to depose a prospective witness is within
23 the sound discretion of the trial court, and is reviewed only for abuse of discretion.
24 *United States v. Drogoul*, 1 F.3d 1546, 1552 (11th Cir. 1993). Among other things, "the
25 principal considerations" are whether the witness's testimony is material to the criminal
26 proceedings, and whether the absence of that testimony would produce an injustice. *Id.*

D. Position of Defendants

The United States has circulated two letters to all defense counsel and to Defendant Poff, specifically suggesting the preservation of Neumann-Garcia's testimony via deposition and requesting any objections to this proposed procedure, and suggesting prospective deposition dates. As of today's date, only counsel for Defendant Reyes-Rodriguez has responded, and he concurred both in the taking and use of the deposition and the date of September 30, 2009. No other counsel or defendant has responded with their position. FPD Koller also has consented to hold the deposition of her client on September 30, 2009.

Hence, the United States requests that the Court Order the taking of Marcos Neumann-Garcia's deposition and the use of that deposition record (video and/or transcript) in lieu of his live testimony at the trial of this matter, and set the deposition date for September 30, 2009, or on another date if agreed by all parties. Once the Court has ordered the deposition date, the United States will file a request with the Bureau of Prisons to halt Neumann-Garcia's transfer to another facility, pending completion of the deposition.

DATED this day of 12th day of August, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2009 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s). I hereby certify that I have served the attorney(s) of record for the defendant(s) that are non CM/ECF participants via telefax.

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